Equilibrating the Organic Fluidity of Customary Law Arbitration and the Rigidity of Judicial Precedent

By
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Abstract
Customary arbitration is about the most utilized mode of arbitration in Nigeria. However, in recent times, resort to customary law arbitration has been on the decline. While the courts to a large degree have contributed to the development of customary law arbitration in Nigeria, this article argues that the application of some aspects of the validity parameters set by the courts and reinforced overtime in line with the doctrine of stare decisisi have to a large extent contributed to the stultification of the growth of customary law arbitration. In providing a comprehensive insight into the underlying challenges, the paper draws from some selected landmark case law and questions the propriety of judicial legislation with specific regards to customary law. The paper concludes that while it is imperative to ensure predictability and certainty in the law and practice of customary law arbitration, these qualities would be better secured if the inherent organic nature of the Nigerian customary law is retained.
Keywords: Customary law arbitration, parameters, customary law, validity, Nigeria.

1.1 Introduction

Customary law arbitration or customary arbitration (used interchangeably)[1] is about the most utilised form of arbitration in most private dispute management arrangement in the informal sector in Nigeria. Sadly, in recent times, resort to it has been on the decline.[2] Among the factors responsible for this dwindling fortune of customary arbitration are the uncertainties created by case law principles bordering on some aspect of the practice, such as parties' right to withdraw from the process at any stage even after an award is made, for any or no reason; the dichotomy between arbitration conducted by a traditionally recognized panel with judicial function and those without

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[1]Nwauche, E.S, 'Customary Law Arbitration and Customary Arbitration in Nigeria' [1999], 3(1), *Nigerian Law & Practice Journal*, 1, tried to distinguish between these two. He argued that customary law arbitration is an arbitration conducted by a panel of recognized customary authority vested with judicial functions. (e.g. body of chiefs and elders of a community) on one hand and customary arbitration is an arbitration whose panel does not have recognised judicial function or recognised customary authority (e.g. oral submission to Market Association or neutral third party, etc.).
[2]Ornguga, Y. and Orhange, N.A., 'Law, legal theory and practice of customary arbitration in Nigeria' [2020] 6(4) *International Journal of Law*, 36-41, 36.

traditional judicial function; and status of customary arbitral awards.[3] Sadly too, from the literature, using the lens of modern arbitration principles, some writers do not consider customary arbitration as arbitration properly so called. On the other hand, others who view customary law arbitration as a valid mode of arbitration align without qualms with the established case law validity test.[4] This piece canvasses that the apparent innocuous position of case law, poses serious impediment for the advancement of the law and practice of customary law arbitration in Nigeria. The paper finds that the uncertainties introduced to the law and practice of customary arbitration, discourages resort to the process, particularly by the new generation of Nigeria. It is against this backdrop that this piece examines the intricacies surrounding customary arbitration in Nigeria and makes suggestions for improvement.

1.2 Customary Law Arbitration

In relating every existing phenomenon to primordial time, King Solomon averred that "What has been is what will be, and what has been done is what will be done; and there is nothing new under the sun."[5] Arbitration's primordial origin antedates most human civilizations. History has it that in the old Roman Empire, settlements of disputes were generally by arbitration entered into with the active approval and assistance of a magistrate, elected annually for that purpose. Reiterating primordial origin of this practice, Cicero recalled that "None would our ancestor permit to be a judex even in the most trifling money matter, not to speak of affairs concerning dignity of a man unless the opposing parties were agreed upon him."[6] As will be shown in the succeeding subheads, the historical development of customary arbitration in Nigeria has a similar antecedent that predates the colonial era.

1.2.1 *Pre-colonial Nigeria*

The situation before the introduction of modern form of adjudication into the geographical territory now known as Nigeria was the same as in old Rome. According to Akpata, before colonisation, arbitration was the only known judicial process[7] and it predates the introduction of the present legal system in Nigeria.[8]In pre-colonial Nigeria, there were no formal state's structures designed to resolved non-criminal matters.

[3]*Njoku* v *Felix Ekeocha* (1972) ECSLR 199
[4] T.O. Elias, *The Nature of African Customary Law*, (Manchester University Press, 1961) 212; Igbokwe, V.C., 'The Law and Practice of Customary Arbitration in Nigeria: *Agu*v *Ikewibe* and Applicable Law Issues Revisited', *Journal of African Law* [1997] 41(2), 201-214
[5]Ecclesiastes 1:9 (The Revised Standard Version of the Bible).
[6]Cited by G. George, *The Law and Practice of Arbitration*, (Great Britian, 1971), 1.
[7] Ephraim Akpata, *The Nigeria Arbitration Law in Focus*, Lagos, (West African Book, 1997), p. 2.
[8]Gadzama, J.K. 'Inception of ADR and Arbitration in Nigeria' a paper presented at NBA conference Abuja, 2004.

Outside the family, resolution of civil disputes was predominantly the work of the elders, chief, Bales, Obas, Alkali and Emirs.[9] In northern Nigeria, the dominant customary law then and till date is the Islamic law (Muslim Law is regarded as part of customary law in Nigeria).[10] The practice of arbitration was regulated under the *Maliki*[11] School of Islamic jurisprudence.[12] The Nigerian version is known as *Tahkim*, which, in line with the injunction of the Holy Quran encourages the use of arbitration to settle disputes.[13] In other parts of the north where the Islamic law system of arbitration was not practised, for instance, in Ilorin, the Daudus (district heads), Magaji, Alangua and family heads played the role of arbitrators in accordance to prevailing customs.[14] In the southern part of Nigeria, the mode of arbitration as in the north varies from one community to another.[15] As part of the common features, the arbitrators were generally family heads, elders of the community and or chiefs subject to whether the society was an cephalous society (has a central authority) or an acephalous society (controlled through collective leadership).[16] Whether in the north or south, the system was based on Customary Law and the procedures at this forum were similar to modern arbitration procedure;[17] in terms of parties' autonomy, freedom to submit, and to select the forum to submit their dispute to. Webster and Bouhen observed that;

> *Quarrels between individual of different families in the ward were settled before the people in the ward, elders acting as arbiter. Quarrels between wards come before the full assembly …A man might attempt to settle with the individual who had aggrieved him, if this failed he could ask respectable elders to intervene or call members of the family together, he could also ask the ward or village head to solve the case.*[18]

[9] Igbokwe (n 4).
[10] Oba, A.A., 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' [2002] 51(4) *International and Comparative Law Quarterly*, 817–850.
[11] Named after the founder of the school (Malik ibn Anas, d.795), who developed the jurisprudence by interpreting the Quran and *Sunna* using three techniques; *ijtihad, ijma* and *qiyas* in connection to Muslim life including dispute resolution.
[12] *Alkamawa v. Bello* [1998] 8 NWLR (Pt. 561) 173 at 182.
[13] Verses 59 and 128 *SuraNisa (Women)*; Verse 9 *SuraAlHujurat (The Chambers)* See also A. El-Ahdab, *Arbitration with the Arab Countries* (2nd ed., Hague, Kluwer Law International, 1999)
[14] Daibu A.A., 'An Examination of the Rules of Natural Justice and Equal Treatment of Parties in Arbitration' (LL.M Thesis, Faculty of Law, University of Ilorin, 2012) 103.
[15] Oluduro, O., 'Customary Arbitration in Nigeria: Development and Prospects' [2011] 19(2) *African Journal of International and Comparative Law*, 307–330 at 312-315.
[16] Ibid.
[17] Alfred Awala, *The Nigerian Magistrate* (Rev. ed, Amftop Book, 2005), 1.
[18] J.B. Webster and A.A. Bouhen, *The Revolutionary Years of West Africa since 1800*, (Longman, 1967), 102-103.

The system was characterised by a simple and fast but informal process known to parties, and resolution rather than judgment was the main objective of the process.[19] And thus, the procedure focuses more on reconciliation and restoring ruptured relationship. Ezediaro reiterated the primordial nature of Nigerian customary law arbitration when he opined that

> *Arbitration as a method of settling dispute is a tradition of long standing in Nigeria. Referral of a dispute to one or more layman for decision has deep roots in the customary law of many Nigerian communities. Such a method of dispute resolution was only reasonable one, for the wise men or the chiefs who were the only accessible judicial authorities. This tradition still persists in certain villages and communities, despite the centralized legal system and the attendant efforts at modernizing and reform of legal system.*[20]

1.2.2 *Colonial Era*

The advent of colonial rule in Nigeria ushered in new governmental institutions including justice delivery system. Some of these institutions include consular courts, prize courts and admiralty courts which dealt with disputes between European merchants and African traders.[21] The Magistrate's courts were introduced to deal with crime and misdemeanour.[22] A Supreme Court was established to administer English Common Law and the doctrine of Equity and pre-1900 Statutes of General Application.[23]

1.2.3 *Post-Independence*

However, despite the introduction of modern court system, most Nigerians particularly the rural dwellers, traders even in urban markets and artisans continue to submit their civil dispute to customary arbitration.[24] The rationale for this attitude on the part of most Nigerians is not farfetched. Holdsworth explanation for a similar situation Britain fits the Nigerian context perfectly well. He explained that

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[19] Ademola, A., 'Court Decongestion: Arbitration, Conciliation, Mediation and Reconciliation' *Judicial Lecture: Continuing Education for the Judiciary*. (1992), 163.
[20] Ezediaro, S.O., 'Guarantee and Incentives for Foreign Investment in Nigeria' [1971] 5 *International Lawyer* 770 at 775.
[21] A. O. Obilade, *The Nigerian Legal System*, (Spectrum Books 2009 reprint) 17-52.
[22] Ibid.
[23] Ibid; see also Ordinance No. 3, 1863.
[24] Oluduro (n 14) 307–330.

> *... the practice of arbitration therefore, comes so to speak, naturally to primitive bodies of law, and after Courts have been established by the State and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to court.*[25]

Till date, subject to the parties' agreement, majority of disputes are still resolved at the level of the family, the village, clan, tribes, clubs and traders' guild.[26] In other words, in time of crisis, the majority of Nigerians in search of peace and justice, deliberately opt for customary arbitration simply because the procedure is known to them, it is fast and cheap.

1.3 Customary law and Customary Arbitration

Constitutionally, there is no definition of the term customary law in the Constitution of the Federal Republic of Nigeria 1999 (CFRN); ipso facto customary law arbitration. Though CFRN made copious references to its existence, for instance there are provisions for the establishment of Customary Court of Appeal;[27] the appointment of at least three persons learned in customary law to the Court of Appeal;[28] and the need to have persons learned in customary on the Supreme Court (unless otherwise indicated, means Nigerian Supreme Court) bench.[29] While there is no national statutory definition of the term, the Imo State Customary Court Law 1984[30] gives a practical definition of the term. The Law defines customary law as "[A] rule or body of customary rules, which obtain and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question."[31]

The courts in line with statutory prescriptions, consider customary law as a mirror of accepted usage,[32] and a source of law just like other sources of law in Nigeria,

[25]Holdsworth, *History of English Law*, (1964) Vol. xiv, 187.
[26]Ezediaro (n 19).
[27] CFRN, section 265 and 280
[28] CFRN, section 237
[29] CFRN, section 288
[30] Edit No. 7.
[31] Ibid, section 1(1).
[32]*Owonyih* v *Omotosho* (1961) 1 All NLR 304 at 309; *Zaidan* v *Mohssen* (1973) 11 SC 1; *Kindey* v *Military Governor of Gongola State* [1988] 2 NWLR (Part 77) 445 and a host of others.

prescribing rules of conduct.[33] In the words of Obaseki JSC, in *Oyewunmi* v *Ogunsesan*,[34]customary law is

> *…the organic or living law of the indigenous peoples of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. Customary law goes further and imports justice to the lives of all those subject to it.*[35]

This definition has been adopted without reservation in virtually all other subsequent cases touch on the issue of customary law.[36] In other words "…the customs, rules, traditions, ethos and cultures which govern the relationship of members of a community are generally regarded as customary law of the people."[37]

Despite judicial recognition of customary law as one of the major sources of law, the irony is that it has persistently remained before the regular court a matter of fact that must be proven through evidence like every other fact.[38] In proving its existence, the burden of proof lies on the person alleging its existence.[39] This may be dispensed with only if judicial notice of the existence of such custom has been taken by a superior court of record. These two common law principle were applied by the Privy Council in the Ghanaian case of *Angu* v *Attah*[40]and as far back as 1940, Nigerian courts made them part of Nigerian case in *Buraimo* v *Gbambgboye.*[41] Incidentally, these two principles of law have since 1956 become part of Nigeria's statutes. Statutorily, it was first introduced via section 14 Evidence Act 1956.[42] This section has now been broken into sections 16, 17, 18 and 19 of the extant Evidence Act 2011, though with slight modifications. Under the extant Evidence Act, a custom is said to have been judicially noticed if it has been adjudicated upon at least once by a superior court of record.[43]

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[33]*Zaidan*v *Mohssen* (1973) 11 SC 1.
[34][1990] 3 NWLR (Pt.137) 183.
[35] Ibid at 207
[36] See for example *Whyte* v *Jack* [1996] 2 NWLR (Pt. 431) 407 at 420; *Mashuwareng* v *Abdu* [2003] 11 NWLR (Pt. 831) 403 at 415-416; others.
[37]OdoemenaNwaigwe& 2 Ors v Nze Edwin Okere [2008] 13 NWLR (Pt1105) 445, per Tobi JSC at 481.
[38]Evidence Act 201, sections 16(1) and 18(1).
[39] Evidence Act 2011, Section 16(2); Egbuta v Onua [2007] 10 NWLR (Pt. 1042) 298 at 315
[40](1921) PC 1874-1926, 43.
[41](1940) 15 NLR 139.
[42]L.N. 47 of 1955; Cap 14 LFN 2004. See A.E.W Park, *The Sources of Nigerian Law,* (Sweet &Maxwel, 1963), 83-97.
[43] Evidence Act 2011, section 17.

These requirements become more meaningful when viewed against the backdrop that Nigeria has over several ethnic groups with over 317 tribes having their various customary laws; though sometimes with some similarities.[44] Moreover, when a superior court acts upon it at least once, it becomes a binding precedent on all inferior courts.

As mentioned earlier, while there are no express provisions under Nigeria's *corpus juris* which directly accord customary law arbitration process legal recognition, there are however provisions which by implication admit its existence. Chief among them is section 35 of the Arbitration and Conciliation Act[45] (the national statute regulating commercial arbitration in Nigeria), which recognises the continuous parallel existence of customary law; *ipso facto* arbitration conducted under it. The section provides "[T]his Act shall not affect any other law by virtue of which certain disputes: (a) may not be submitted to arbitration; or (b) may be submitted to arbitration only in accordance with the provisions of that or another law." Statutorily, since customary law is one of the extant sources of law in Nigeria,[46] it is safe to posit that the reference to "the provisions of that or another law" in the section includes customary law arbitration. And thus rather than stultify the growth of customary arbitration, the Act expressly exempted it from its ambit.

Again, it is trite that courts in Nigeria are enjoined by most State High Court Laws[47] to observe and enforce the observance of every customary law which applies to a given set of facts and is neither repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force.[48] Under this and similar provisions, the courts have been able to give recognition to and enforce customary arbitration and contributed to the growth of modern customary arbitration in Nigeria. [49] In *Eugene Nnaekwe Egesimba*v *Ezekiel Onuzuruike,* [50] while acknowledging that customary arbitration is deep-rooted in Nigerian Customs, the Supreme Court acknowledged that

> *Customary arbitration by elders of the community is one of many African customary modes of settling disputes and once it satisfied the necessary requirements indicated*

[44]Editorial, 'Full List of All 371 Tribes in Nigeria, States Where They Originate, *Vanguard Nigeria* (10 May 2017) <https://www.vanguardngr.com/2017/05/full-list-of-all-371-tribes-in-nigeria-states-where-they-originate/#:~:text=Nigeria%20is%20made%20up%20of,Igbo%2C%20Hausa%20and%20the%20Yoruba>.Accessed 14 October 2020.
[45] 1988, Cap A 18 LFN 2004.
[46]*Esuwoyev Bosere*[2017] 1 NWLR (Pt. 1546) 256 at 325-326
[47] See for instance Section 13(1) of the High Court Law, Laws of Bendel 1976, applicable in Edo State.
[48] Evidence Act 2011, section 18(2); Federal Capital Territory Customary Court Act 2007, section 16 (a)
[49]Nwauche (n 1), 22.
[50][2002] 15 NWLR (Pt. 791) 466 S.C.

> *above as in the case, its decision shall have a binding effect, and has the same authority as the judgment of a judicial body having binding effect on the parties and thus create an estoppel.* [51]

Thus, customary arbitration is a private traditional arrangement, regulated by the custom of parties or any agreed custom, whereby parties submit their dispute to a traditionally recognised arbiter(s) to adjudicate on same with an underlying understanding that parties would abide by the final award issued by the arbiter(s). It is therefore beyond contestation that in Africa and Nigeria in particular, customary law arbitration is one of the existing mechanisms for dispute resolution.

1.4 Amorphous Status of Customary Arbitration

Contrary to the above position, some commentators have criticised the classification of the customary law arbitration as arbitration properly so-called. Among them is Allott, an eminent scholar of African law. He contends that there are no grounds for such distinction, because, arbitration as known in English law, is alien to African customary law. In his view, all purported cases of arbitration under customary law are but mere negotiations for a settlement or mere attempts at a settlement agreed upon by the parties with the active assistance of the elders; and the parties thereto are always free to withdraw from the arrangement at any time before the award.[52] Similarly, Matson had earlier contended that the distinction between customary arbitrators in Africa and those who attempt reconciliation is incorrect and misleading, that within African context reconciliation is often mistaken for arbitration and what is erroneously referred as arbitration differs from the English notion of arbitration.[53]

A painstaking reading of the decisions in some reported old cases, reveal that the courts have not always treated customary arbitration too differently from the views expressed in the preceding paragraph. The *ratio* in *Okpuruwu* v *Okpokan,*[54] is a classic example of earlier odium for customary law arbitration. In the case, the court in clear terms deprecated the practice of customary arbitration, holding that the right to adjudicate on any justiciable matter was the exclusive preserve of the court. Uwaifo JCA said

> *I do not know of any community in Nigeria which regard the settlement of arbitration between disputing parties as*

[51] Ibid, at 513.
[52] A. Allott, *Essays in African Law*, (Butterworth, 1960), 126.
[53] J.N. Matson, "The Supreme Court and the customary judicial process in the Gold Coast", (1953) 21 *I.C.L.Q* 47, 58.
[54] [1988] 4 NWLR (Pt. 90) 554

> *part of its native law and custom. It may be that in practical life when there is a dispute in any community, the parties involved may sometimes decide to refer it to a third disinterested party for settlement. That seems more a common device for peace and good neighbourliness rather than a feature of native law and custom, unless there is any unknown to me which carries with it 'judicial function' or authority as in Akan Laws and Customs. I do not also know how such a custom, if any, or more correctly such practice, to get a third party to intervene and decide a dispute can elevate any such decision to the status of a judgment with a binding force and yet fit it into our judicial system. Admittedly, there can be arbitration in the loose sense of the word here in Nigeria quite apart from that recognized under various statutes to look into parties' disputes.*[55]

On the contrary, the rejoinder made within the same judgment by Oguntade, J.C.A., who concurred on all other issues, but vehemently dissented on the legal status of customary arbitration under Nigeria's legal system, is an unequivocal restatement of what customary arbitration actually is. His Lordship held,

> I find myself unable to accept the proposition that there is no concept known as customary or native arbitration in our jurisprudence. The regular courts in the early stages of arbitration were reluctant to accord recognition to the decisions or awards of arbitrators. This attitude flowed substantially from a reasoning that arbitration constitutes a rival body to the regular courts. But it was soon realized that an arbitration may in fact prove the best way of settling some types of dispute. The attitude of the regular courts to arbitration therefore gradually changed. It was then realized and acknowledged that if parties to a dispute voluntarily submit their dispute to a third party as arbitrator, and agree to be bound by decision of such arbitration then the court must clothe such decision with the garb of estoppel *per rem judicatam.*[56]

[55] Ibid, at 572
[56] Ibid, at 585

In *Ufomba v. Ahuchaogu*[57]Niki Tobi JSC re-echoed this hostility. In his view, "Native or customary arbitration is only a convenient forum for the settlement of native disputes and cannot be raised to the status of a court of law."[58]

Over the years courts' resentment against customary arbitration has gradually waned out and the courts have come to accept customary arbitration as a definite part of Nigerian *corpus juris*,[59] though with some caveat. In institutionalising the caveat, the courts, without statutory[60] or customary law backing, designed rules to test the validity of customary arbitration.

1.5 Extant Judicial Parameters for Valid Customary Arbitration and *Stare Decisisi*

The controversy over what constitutes valid customary arbitration has elicited much debate in the legal literature.[61] The answer to this controversy becomes very important, because, where a customary arbitration award is adjudged valid, the award will have the same authority as the judgment of a regular court, binding on the parties and creating an estoppel. However, whether, such a decision will operate as an estoppel *per rem judicatam* or issue estoppel can only be decided where the terms of the decision are known and ascertained and, where they so operate, both parties are entitled to invoke the plea.[62] The case of *Oparaji v Ogidereji*[63] highlighted the need for certainty on terms of the award. In the case, both parties in the case pleaded and relied heavily on two customary law arbitrations between them in respect of a parcel of land in dispute. The two persons who headed the separate arbitration were called as witnesses. Each party to the suit gave a different version of the decision of the arbitration panels and from the evidence, there was no agreement between the parties as to the real decision of the arbitrations. Each of the parties claimed that decisions were in his favour. The trial court found that the issue of estoppel founded on the two arbitration proceedings was not established by the parties and as such parties could not rely on same as an estoppel.

[57][2003] 8 NWLR (Pt. 821) 130.
[58] Ibid, at 160
[59]*Ohiaeri* v *Akabeze* [1992] 2 NWLR (Pt.221) 1 at 24; *Awosile* v *Sotumbo* [1992] 5 NWLR (Pt.243) 514; *Onwuanumkpe* v *Onwuanumkpe* [1993] 8 NWLR (Pt. 310) 186.
[60] Evidence Act 2011, sections 16,17, 18 and 19.
[61] See Allot (n 51); Igbokwe (n 4) along with a host of others.
[62]See *Oparaji v Ogidereji* (1999) 70 LRCN 1822; *Idika&Ors v Erisi&Ors* (1988) N.S.C.C. 977 at 986; [1988] 2 NWLR (Pt. 78) 563; *MogoChikwendu v Mbamali&Anor*. (1980) 3/4 SC 31 at 48, *Joseph Larbi&Anor. V OpaninKwasi&Anor*. (1950) 13 WACA 81; *AhiweOkere&Ors v Marcus Nwoke&Ors*. [1991] 8 NWLR (Pt. 209) 317.
[63]*Oparaji v Ogidereji,Supra*.

In addition, before a customary arbitration award can be enforced and or pleaded as estoppel, the court requires that the party relying on it must in addition to establishing the existence, prove the validity of the arbitration. As mentioned earlier, to ascertain the validity of the customary arbitration, the courts overtime designed certain parameters for the purpose. In *Agu* v *Ikewibe*[64] adumbrating on the requirements, the Supreme Court stated that the parties must show that the customary arbitration was "… founded on the voluntary submission of the parties to the decision of the Arbitrators who are either the Chiefs or Elder of their Community, and the agreement to be bound by such decision or freedom to resile where unfavourable." Following this decision, over the years a party who wishes to rely on customary law arbitration in addition to proving its existence must plead and is required to prove to the satisfaction of the court that (a) parties voluntary submitted the matter in dispute for resolution; (b) parties agreed either expressly or by implication that the decision of the arbitration will be accepted as final and binding; (c) the arbitration was conducted adhering to the custom of the parties; (d) the arbitrators reached a decision and published an award, and; finally (e) the decision or award was accepted at the time it was published.[65]

In *Eke* v *Okwaranyia*[66] Uwaifo JSC while relying on the dictum of Akpata JSC[67] in *Ohiaeri*v *Akabeze*, justified the approach adopted by the courts. He reasoned that the courts needed to be circumspect in granting recognition, because according to him

> It is a common feature of customary arbitration in a closely knit community that some of the arbitrators if not all, not only have prior knowledge of the facts of the dispute, but also have their prejudices and varying interests in the matter, and are therefore sometimes judges in their own cause and are likely to pre-judge the issue. Prior knowledge and pre-judging issues are more pronounced in land disputes having bearing with the founding of the village and how families migrated to the village and come to occupy parcels of land. The arbitrators are well informed on these matters. The position however is that traditional history is sometimes transmitted, received or construed with a slant by the person using it for a purpose. Hence it is essential before

[64](1991) 3 NWLR (Pt. 180) 385 at 407.
[65]*Okoye&Anor.vObiaso&Ors.* (2010) Vol 186 LRCN 181, at 185. See also *Igwego v Ezeugo* [1992] 6 NWLR (Pt. 249) pg.561; *Anyabunsi v Ugwunze* [1995] 6 NWLR (Pt.401) 255; *Egesimba v Onuzunuke* [2003] 15 NWLR (Pt. 791) 466; and *Eke v Okwaranyia* (2001) 86 LRCN 1403 at 1428-9.
[66](2001) 86 LRCN 1403 at 1428-9.
[67]*Ohiaeri v. Akabeze* (1992) 7 LRCN 163; (1992) 2 NWLR (Pt. 221) 1.

> applying the decision of a customary arbitration as an estoppel for the court to ensure that parties had voluntarily submitted to the arbitration, consciously indicated their wiliness to be bound by the decision and had immediately after the pronouncement of the decision unequivocally accepted the award.

Despite an avalanche of disapproval in legal literature,[68] the Supreme Court continues to endorse these judicially formulated parameters as the basic yardstick for measuring the validity of a customary arbitration. Recently, in *Okala v. Udah,*[69] the court said "Anything short of these conditions will make any customary arbitration award risky to enforce. In other words, unless the conditions are fulfilled, the arbitration award is unenforceable."[70]

One conclusion from the preceding discussions is that the parameters enunciated by the apex court, technically represent the extant position of the law on the issue and the lower courts are by implications of the doctrine of *stare decisis*[71] (a doctrine underlying Nigerian legal system[72]), obliged to follow and apply them whether or not the lower courts consider them the correct position of customary law on the issue. In *Integrated Realty Ltd. v. Odofin*[73] Augie JSC reiterated this common law doctrine and the obligation of all subordinate courts to adhere to. His Lordship explains that

> … Where from the facts of a case, the principle of law stated by the Supreme Court is applicable, it is unconstitutional, unlawful and a violation of the principle of *stare decisis* for a subordinate court to make rules or conditions for the application of that principle of law.

[68] See Oluduro (n 14), 322-326; Ezejiofor, G., 'Prerequisites of Customary Arbitration' [1992–1993] 16–18 *Journal of Private and Property Law*, 30; A. I. Chukwuemerie, *Studies and Materials in International Commercial Arbitration*, (Lawhouse Books, 2002), 109

[69] [2019] 9 NWLR (Pt. 1678) 562

[70] Ibid, 580-581.

[71] Also known as judicial precedent; a basic principle of the law which states that once a decision (a precedent) on a certain set of facts has been made, other courts of concurrent jurisdiction or lower jurisdiction, must apply that decision in cases presenting the same set of facts. Thus, the decision of superior court forms a precedent and becomes binding and must be followed by courts of like or lower jurisdiction. See; *Idoniboye-Obu* v *NNPC*[2003] 2 NWLR (Pt. 805) 589; *Chief of Air Staff* v*Iyen* [2005] 6 NWLR (Pt. 922)496 ; *Amaechi*v *INEC* [2008] 5 NWLR (Pt. 1080)227; *AdetounOladeji (Nig.) Ltd.* v *Nigerian Breweries* [2007] 5 NWLR (Pt. 1027) 415; *Aghedo* v*Adenomo*[2018] 13 NWLR (Pt. 1636) 264; *Ibrahim* v *A.P.C. (No 2)*[2019] 8 NWLR (Pt. 1674) 269

[72] *David Oye Olagbemiro* v *Oba Oladunni Ajagunbade III* [1990] 3 NWLR (Pt. 136) 37

[73] [2018] 3 NWLR (Pt. 1606) 301

Consequently, lower courts are not entitled and have no discretion "to add to, modify, qualify or make additional rules for applying decisions"[74] of the Supreme Court. Where it does happen, the decision of the lower court would be adjudged to be unconstitutional, unlawful and a violation of the principle of *stare decisis*. In line with the doctrine, the Supreme Court and the lower courts have consistently applied the case law requirements to determine whether or not to recognize and enforce a customary arbitration as constituting anestoppel between the parties. In *Okala* v *Udah*, the Supreme Court upheld the decisions of the two lower courts (High Court and Court of Appeal), because according to the court, "All … 5 ingredients presented themselves which impelled the lower court to enforce the customary arbitration ..."[75]

1.6 The Fallacy of Uniform Assessment Parameters

The fallacy innate in judicial attempt to formulate uniform parameters to determine the validity of customary law arbitration in the whole of Nigeria is that the exercise of such powers is expressly ultra vires the powers of the courts; being inconsistent with the interpretative powers granted to the courts by the various enabling statute.[76] With regard to customary law, the power granted is limited to recognizing the existence of any custom that has been proven to exist through evidence or has been judicially noticed, and to apply same as binding. Thus, the courts can only recognize and enforce custom that are accepted by the particular people as valid or reject same even though recognised by the particular people where the custom is contrary to public policy, or is not in accordance with the rules of natural justice, equity and good conscience;[77] the courts lack the power to modify or adjust same.

The parameters listed in *Agu*v *Ikewibe* do not reflect the true nature of customary law, ipso facto customary arbitration in Nigeria and they run contrary to some major characteristics of Nigeria customary law. These qualities are, flexibility or dynamism, limited geographical applicability or coverage (peculiar each ethnic or tribe); absence of a uniform Nigerian customary arbitration law. The result is that the court in its bid to harmonize and give Nigeria a uniform customary arbitration law and practices, embarked on judicial legislation. This is contrary to the well settled principle of law

[74] See *Dalhatu* v *Turaki&Ors* [2003] 15 NWLR (Pt. 843) 310; *Olufeagba*v*Abdur-Raheem* [2009] 18 NWLR (Pt. 1173) 384 at 442-44.
[75]N 68, at 581. See N. Ikeyi and T. Maduka "The Binding Effect of a Customary Arbitration Award: Exorcizing the Ghost of *Agu v Ikewibe*" (2014) 58(2) pp. 328-349, who on the contrary argues that the current predominant indication from the Supreme Court is that post-award consent is not necessary to establish a binding customary arbitration award in Nigeria.
[76]Evidence Act, sections 16-19.
[77] Evidence Act 2011, section 18(3); see also the dictum of Lord Atkin in *Eleko* v *Government of Nigeria* [1931] AC, 662 at 678. Where his lordship held that courts cannot transform customs.

that court in the discharge of its interpretative function should avoid judicial legislation.[78] In *F.B.N. Plc* v *Maiwada*,[79] the same Supreme Court observed that

> … judge should be firm and pungent in the interpretation of the law but such should be short of a judge being a legislator. This is because, it is the duty of the legislature to make the law and it is the assigned duty of the judge to interpret the law as it is, not as it ought to be. That will be flouting the rule of division of labour as set out by the 1999 Constitution.[80]

Assuming that some customs admit of the ingredients as laid by the Supreme Court, it is still inappropriate to apply the same as a uniform rule to all customary arbitration in Nigeria, simply because, no customary law in Nigeria has universal application throughout the country. Consequently, each case must be treated separately and validity determined based on the requirements of the particular customary law in issue. Admitted that there may be some common features, yet this does not dispense with the statutory requirement that each custom determines the scope and content of its procedural and substantive law. Consequently, where a particular customary arbitration is governed by a valid customary law, the issue of these parameters ought to be jettisoned. Certainly, every custom has rules regulating customary arbitration known to the practitioners and thus dispense with the uniform ingredients as enunciated by the courts. Among the core issues calling for review under the court formulated customary arbitration validity test are the requirement of post-award consent of the parties and that the arbitration must be conducted by a traditionally recognised institutions for dispute resolution.

1.7.1 Post-award consent requirement

The most controversial aspect of the above highlighted judicial formulated parameters for assessing the validity of customary law arbitration is the assertion that customary arbitration is only binding if none of the parties rejected the award after it was made. Painstaking scrutiny of legal literature and previous judicial authorities reveals that the trajectory of the notorious post-award consent laid down in *Agu* v *Ikewibe* is alien to virtually all known customary laws in Nigeria. The common trend as noted above is that customary arbitration has been part of the custom of the people of Nigeria from time immemorial, however, the practice varies from community to community even

[78] *Olowu& 3 Ors*. v*Abolore&ano*r. (1993) 6 SCNJ. (Pt.1) 1 at 19 – 20.
[79] [2013] 6 NWLR (Pt. 1348) 444
[80] Ibid, at 484.

among communities within the same region. Each tribe or community has a unique form of customary arbitration, which is well suited to their local circumstances.[81]

Contrary to the notorious post-award consent requirement, it is trite that one of the underlying attractions for submitting dispute to arbitration is the finality of the award as well as the sanctity of the contract to arbitrate. Thus, as a general rule, the courts would not allow a party who voluntarily submits to arbitration to subsequently resile from the process or the decision reached. The law is that where parties to a dispute voluntarily submit issues in controversy between them to arbitration, the decision of such arbitration would be accepted as final and binding on them and it is not open to either party to subsequently back out of the agreement or resile from being bound by the final award of the arbitration panel.[82]

Similarly, it is there is no customary law in Nigeria that allows a party who voluntarily submits to customary arbitration to subsequently resile from the decision reached.[83] The law is that where two parties to a dispute voluntarily submit the issue in controversy between them to arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrator(s) reach a decision, it would no longer be open to either party to subsequently back out of or resile from the decision so pronounced.[84] In fact, if such custom exist, it lies in the power of the court to hold that it is repugnant to good sense and equity, and thus allowed to refuse the losing party the right to reject the decision of the arbitrators to which he voluntarily submits to its jurisdiction.[85] The correct position is that submission to customary arbitration is irrevocable. Historically, this was the position in the early days of regular courts in Nigeria. This position was well presented by Betuel P.J., in *George Onwusike v. Patrick Onwusike*,[86]

> The decisions given by the elders, authorised by custom to settle such disputes, and exercising their customary functions, as a result of the submission of the parties to their jurisdiction, unless clearly wrong in principle, is

[81] Akanbi, M.M., Abdulrauf, L.A. and Daibu, A.A., 'Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift' [2015] 6(1) *Afe Babalola University: Journal of Sustainable Development, Law & Policy*, 199-221 at 205
[82] *Okala* v*Udah*, (n 68), 576-577.
[83] *Oparaji* v *Ohanu* [1999] 9 NWLR (Pt.618) 290 at 309.
[84] See *Opanin Kwasi&ors*v *Joseph Larbi* (1952) 13 WACA 76; *Olinev Obodo&Ors* (1958) S.C.N.L.R 298; *Philip Njoku*v *Felix Ekeocha* (1972) 2 E.C.S.L.R 199; *Eguere Inyang*v *Simon Essien* (1957) 2 F.S.C 39.
[85] See *Aguv Ikewibe, supra*.
[86] (1926) 6 Eastern Nigerian Law Report 10.

> binding on them ... .I apprehend that it would be contrary to common sense to allow persons who have voluntarily submitted their dispute to an independent body of their own choosing to render nugatory the decision arrived at, merely because it does not favour the interest they assert or in some other way is regarded by them as unsatisfactory.[87]

Far back 1958, the Federal Supreme Court of Nigeria in *Oline v. Obodo*[88] rejected the contention that customary arbitration was merely a settlement which allows a party to withdraw at any stage. The court found that:

> ... where parties submitted their dispute for settlement by arbitration in accordance with Native Customary Law and one party withdrew from the arbitration before it was completed, the award of the arbitration was nevertheless binding on all the parties. In the present case, there is a finding of fact against the appellants that they attended the arbitration and that they agreed to be bound by the award of the arbitrator.[89]

The Supreme Court maintained this salutary position[90] until 1992 when *Agu case* introduced the controversial requirement of non-withdrawal of any of the parties midstream or immediately after the award is issued. Soon after *Agu's Case*, in a welcome effort to obliterate the obnoxious requirement, the Supreme Court in *Awosile v Sotunbo*[91] via an *obiter dictum*, attempted to exclude the requirement by limiting them to four. To wit; 1) voluntary submission to arbitration by the parties; 2) implied or express agreement to be bound by the decision of the arbitrators; 3)conduct of the arbitration under a particular customary law, and; 4) publication of a final award. Another attempt was made by the court in *Igwego v. Ezeugo*[92] where the court upgraded its *obiter dictum* in *Sotunbo case* to *ratio decidendi*. This was the state of the law until the Supreme Court once again reintroduced the post-award consent as one of

[87]Ibid. at 14.
[88][1958] 3 FSC 84.
[89] Ibid at 86.
[90]For instance in *Ohiaeri v. Akabueze* [1992] 2 NWLR (Pt. 221) 1.
[91][1992] 5 NWLR (Pt. 243) 514.
[92][1992] 6 NWLR (Pt. 249) 10.

the parameters or ingredient of a valid customary arbitration award in *Eke* v *Okwaranyia*[93] and the position has remained till date.

While conceding that a party is right to seek to set aside an arbitral award which is not in harmony with the relevant customary law, with due respect, the Supreme Court missed the bull's eye. Though viewing customary arbitration through the lens of western non-adjudicatory settlement mechanisms, the court failed to appreciate that customary arbitration is not conterminous with negotiation for settlement or other non-adjudicatory peaceful resolution modes. It is the failure of the Supreme Court to see the dividing line between these different modes of private dispute resolution mechanisms that has resulted in the extant uncertainties surrounding customary law arbitration.

In practice, under most customary law, a party has no power to reject the award of the customary arbitration unless there is (are) credible evidence showing that the particular custom permits of such conduct.

1.7.2 Conduct of customary arbitration under customary law

Another nagging issue arising from the case law formulated customary arbitration validity test, which has been the subject of debate (because of its potential of stunting the growth of customary arbitration), is the requirement that the arbitration must have been conducted in accordance with the custom of the parties. This has led to the artificial dichotomy between arbitration conducted by traditionally recognized panel with judicial function and those conducted by a penal without traditional judicial function. The fact is that most Nigerians -particularly the rural dwellers, traders and artisans- still submit their disputes to arbitration. In most of these instances, the disputes are submitted to persons who are not chiefs, elders or traditionally recognized institutions for resolution. A perusal of the cases indicates that two types of conducts purported to be customary arbitration have been the subject of assessment by Nigerian courts as to whether they qualify as customary law arbitration. The first type of conduct is decisions reached by institutions such as chiefs and elders traditionally recognised by customary law as possessing the power to resolve disputes. For instance in *Ohiaeri v Akabeze*[94], the customary arbitration was made by the traditional ruler and his cabinet; in *Agu v Ikewibe*it was the chief and elders of the town. The second type of practice involves persons who possess no authority recognised by customary law. Such was the case in *Iyang v Essien*[95] were councillors of District Council acted as arbitrators. In

[93](2001) 86 LRCN 1403.
[94](1992) 7 LRCN, 163.
[95](1957) 2 FSC 39.

Okere v Nwoke[96], Parents/Teachers Association body played the role of arbitrators. Uwaifo JCA in *Okpuruwu v Okponkam*, referring to this type of arbitration, noted that "it may be that in practical life when there is any dispute in any community the parties involved may sometimes decide to refer it to a third disinterested party for settlement … Admittedly, there can be arbitration in a loose sense of the word here in Nigeria quite apart from that recognised under various statutes."[97]

An excursion into the cases establishes that courts are toeing the line suggested in *Inyang v Essien*[98], where the persons who acted as arbitrators under native law and custom were not elders but councillors under District Council and therefore the court held that the panel had no authority to make a binding order.[99]Ubangwu, reasoning along the parameters listed in *Agu v Ikewibe* and subsequent decisions, believes that the distinction between chiefs and elders on the one hand and other people who conduct arbitration is that the former have recognised judicial function.[100] In his opinion, at best the actions of those who are not chiefs or elders can be described as peace settlement or conciliation.[101] It is difficult to agree with Ubangwu, because, what he referred to as peace settlement or conciliation is known to customary law as arbitration and it fast developing as a practice in Nigeria one that can be regarded as a uniform custom and common law of Nigeria.

It is a negation of the customary law to assert that if parties to a dispute submit their dispute to a group of people for settlement and satisfy all the pre-requisite listed in the cases, except that the submission is oral and not before a recognised traditional authority or is in an urban setting, such submission is a peace settlement or conciliation. It is difficult to urge the court not to accept such decisions as customary arbitration because parties cannot relate the source of the arbitral tribunal to any customary law. Elementarily, the authority of the arbitral tribunal lies in the parties' voluntary submission of their dispute to the tribunal and agreement expressly or implied, to be bound by the decision reached by the tribunal, and not with the class or choice of

[96]*Okere v Nwoke* [1991] 8 NWLR (Pt. 209) 317.
[97]N 53, 572.
[98]*Inyang v Essien* (1957) 2 FSC 39.
[99] This is the interpretation given to this case by the Supreme Court in *Agu v Ikwewibe, supra* 413. See also the case of *Obasi v Onwuka* (1987) 2 NSCC 981 where the Supreme Court disregarded the arbitration because the parties did not accept the award.
[100]Ubangwu, 'Is Customary Arbitration Part of Nigerian Jurisprudence' [1989], 2(7), GRBPL 62 at 64. See also *Kwasi v Larbi*, 13 WACA 76 at 79, where the Privy Council said "in native customary law, the elders have a recognized judicial function and are in fact a tribunal before which native can bring their disputes for judicial decision.
[101]Ubangwu, (n 99) 64-65. See also Elombi, G., 'Customary Arbitration: A Ghanaian Trend Reversed in Nigeria's' (1993), 5 RADIC 803.

arbitrators. Expressing parties' autonomy to choose a forum or arbitrators under customary law, Oguntade, JCA, observed that

> In pre-colonial time and before the advent of regular courts, our people certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. This practice has over the years become so strongly embedded in the system that they survive today as customs ... I do not share the view that natives in their own communities cannot have custom which operates on the same basis of voluntary submission. The right to freely choose an arbitrator to adjudicate with binding effect is not beyond our native communities.

1.7.3 Cutting the *Gordian Knot*

There is a general consensus in legal writings that arbitration is about the most accepted form of Alternative Dispute Resolution mechanisms and if properly employed it will greatly assist in justice delivery. It is flows from the preceding discussion that greater result will be achieved if customary law arbitration is accorded its rightful recognition under every custom, provided such custom meets the requirements of the Evidence Act 2011. Consequently, if intending parties are sure that they would be able to enforce decisions from customary arbitration, certainly, being a faster, simpler and less expensive mode of dispute resolution, it would become the most preferred forum for dispute resolution in Nigeria.

It is against this backdrop that this paper recommends the jettisoning of case law onerous requirement that a party relying on customary arbitration should establish to the satisfaction of the court that "neither of the parties has resiled from the decision so pronounced". In its stead, the party should only be required to establish in evidence the requirements prescribed by the applicable customary law for a valid customary arbitration under the particular custom.

In adhering to the above suggestion, the courts should apply present day custom and not that of year star years. In doing so, the totality of the elements which characterize a given custom should be taken into consideration. It is trite that customs undergo changes and modifications subject to the needs of society. And Nigerian customary law to a great degree exhibits this fine self-modifying quality, customary law is described as

a mirror of accepted usage.[102] Osborne, CJ expounding on this quality of customary law said "... It appears to have always been subject to motives of expediency, and it shows unquestionable adaptability to alter circumstances without entirely losing its character."[103] Of course in this regard customary arbitration under customary law is no exception. Thus, with regard to arbitration conducted by an arbitral tribunal lacking traditional judicial function, which in recent times is prevalent in Nigerian,[104] the justification for according recognition to this specie of arbitration could be premised on accepted practices (one of the core characteristics of valid customary law) and the fact that parties voluntarily submitted to the process. From the cases referred to above, there is overwhelming evidence that this type of arbitration exists in Nigeria especially in urban areas where customary institutions vested with arbitral powers may not exist or where the dispute is between persons from different ethnic background. It suggested that such arbitration should be considered as forming part of Nigerian national customary law and be accorded recognition; thereby endorsing a dispute settlement mechanism which is simple, less formal and fast. The use of the term customary arbitration seems acceptable because it signifies that it is an arbitration that does not fall under statutory regulated arbitration and its validity is premise on societal acceptance. After all, the principles of English Common law were majorly developed by the courts who took judicial notice of prevailing practices and usage.[105]

Again, since arbitral award generally ranks *pari-pasu* with a judgment of a court, it is submitted that only a competent court of law has the power to set aside a customary arbitration award. In this regard there is a need for statutory intervention, stipulating that until a customary arbitral award is set aside within a stipulated timeline, the award is binding and a party cannot resile from it. In this regard it is not out of place for the arbitral tribunal to reduce its award into writing.

On the whole, it is important to note that by the foregoing, the paper should not for once be seen as postulating that a customary arbitration award-debtor must accept whatever decision that is rendered against him hook, line and sinker. Far from that, the point being made is that while he has no power whatsoever to reject *suomotu*the award so made, he has the right to take steps to challenge the award and apply for it to be set aside by a competent authority within the ambit of the law.

[102] See *Lewis v. Bankole* (1929) 1 NLR 82 at 84.
[103] See *Owonyin v. Omotosho* (1961) 1 ANLR 304.
[104]Ezejiofor (n 67), 34.
[105] J Farrer and A Dugdale, *Introduction to Legal Method* (2nd edn, London, Sweet & Maxwell, 1984), 33-34

1.8 Conclusion

Judicial removal of the fundamental architectural underpin of customary law arbitration through judicial legislation, negates the cardinal rules of interpretation and the primordial principles of binding arbitral award upon which customary arbitration thrives.[106] Without mincing words, the parameters outlined by the court for testing the validity of customary law arbitration are tantamount to judicial legislation which is clearly outside the traditional adjudicatory interface of the courts. In addition the act is faulty, because the basis of enunciation of the parameters is predicated on wrong assumptions that are inconsistent with the fundamental characteristics of customary law. Unless the Supreme Court expressly over rules or review all its previous decisions on the issues herein discussed, the prevailing state of uncertainty in the law and practice of customary arbitration will persist. This state of uncertain has the potential of leading to a gradual obliteration of customary law arbitration in Nigeria. It is hoped that the Supreme Court as soon as it has the opportunity, will take a mulligan and adjust its position to reflect the law.

[106]Jain, A., 'Pathological Arbitration Clauses and Indian Courts' [2008], 25-4, *Journal of .International Arbitration*. 433, 442